DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS: 05-0237
INDIANA CORPORATE INCOME TAX
For the Years 1998 through 2000

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ISSUE

I. **Reallocation of Taxpayer's Sales Income to Indiana** – Throwback Sales.

Authority: IC § 6-3-2-2(e); IC § 6-3-2-2(n); IC § 6-3-2-2(n)(1); IC § 6-8.1-5-1(b); 45 IAC 3.1-1-53(5); 45 IAC 3.1-1-64; Wash. Rev. Code § 82.04.070, .080, .090; Wash. Rev. Code § 458.20.193(1)(d); Tax Management Multistate Tax Portfolios 1610:02.B (1998).

Taxpayer protests the audit's determination that certain of its sales income – resulting from shipment of goods from taxpayer's Indiana manufacturing plants but delivered to customers within other, foreign states – should be included in the Indiana throwback calculation.

STATEMENT OF FACTS

Taxpayer is a publicly held Indiana company which builds recreational vehicles and modular building. Taxpayer manufactures, markets, and distributes recreation vehicles and trailers. Taxpayer designs, manufactures, markets, and distributes modular homes.

Taxpayer is the parent company for twenty-three subsidiaries. Taxpayer files an Indiana combined return for the entire affiliated group reporting on a unitary basis.

The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax returns for the years 1994 through 2000. In addition to various other adjustments, the audit determined that certain of taxpayer's 1998 through 2000 sales to customers located in the other states were subject to the throwback rule.

On the ground that it was subject to the foreign states' net income tax and that the sales should not have been thrown back, taxpayer submitted a protest. A hearing was conducted during which taxpayer's representative explained the basis for its protest. The Department issued a Letter of Findings denying the protest because taxpayer failed to provide adequate information to sustain its argument. Taxpayer requested a rehearing on the ground that it could provide the necessary information. The request was granted and this Supplemental Letter of Findings results.

I. Reallocation of Taxpayer's Sales Income to Indiana – Throwback Sales.

DISCUSSION

Taxpayer challenges the Department's determination requiring the throwback of sales to destination states on the ground that taxpayer is subject to a net income tax in those other, destination states. The Department's report took the stance that – for the purposes of determining the taxpayer's corporate income tax liability – certain sales to out-of-state customers should be allocated back to Indiana because the sales were to customers located within the other states where the taxpayer was *not* subject to a state net income tax. The original Letter of Findings denied taxpayer's protest on the ground that taxpayer failed to provide information sufficient to rebut the audit report's original conclusion. As stated in the original Letter of Findings, "The information provided by taxpayer lacks substantiation or is conclusory."

Pursuant to 45 IAC 3.1-1-53(5), "[I]f the taxpayer is not taxable in the state of the purchase, the sale is attributed to [Indiana] if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state." 45 IAC 3.1-1-64 defines what it means to be "taxable in the state of purchase." The regulation states that, "A corporation is 'taxable in another state' . . . when such state has jurisdiction to subject [the taxpayer] to a net income tax." Id. According to the audit report, "The audit has examined the taxpayer's activities in all states where shipments were indicated on their sales reports. From this examination determinations were made on which states the taxpayer is not subject to a net income tax and therefore subject to the throwback regulation."

IC § 6-3-2-2(e) provides that "[s]ales of tangible personal property are in this state if . . . (2) the property is shipped from an office, a store, a warehouse, a factory or other place of storage in this state . . . (B) the taxpayer is not taxable in the state of the purchaser."
IC § 6-3-2-2(n) provides that

> [f]or purposes of allocation and apportionment of income . . . a taxpayer is taxable in another state if: (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

Therefore, in order to allocate income to a destination state – and take the income out of Indiana's reach – taxpayer must show that one of the taxes listed in IC § 6-3-2-2(n)(1) has been levied against the taxpayer or that the destination state has the jurisdiction to impose a net income tax regardless of whether that state actually does so.

In taxpayer's original protest, taxpayer stated that it engaged in non-exempt activities in twenty-three jurisdictions and that sales to customers within those twenty-three jurisdictions should not be thrown back to Indiana.

When a taxpayer challenges a tax assessment, it is up to the taxpayer to demonstrate that the assessment is incorrect. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(b).

Taxpayer has submitted copies of state income tax returns for the following thirteen jurisdictions: Arizona; Colorado; Idaho; Massachusetts; Maine; Mississippi; Nebraska; New Mexico; New York; Oklahoma; Oregon; Utah; and Vermont. In certain instances, the returns were filed pursuant to a Voluntary Disclosure Agreement with that state. Taken together with the information submitted at the time of the first hearing, the information provided is sufficient to establish that sales made to customers within the above enumerated states is not subject to Indiana's throwback rule because taxpayer has demonstrated that it was subject to the states' net income tax.

Taxpayer also submitted a Washington "Combined Excise Tax Return." Washington State levies a gross receipts tax imposed on "the privilege of engaging in business." Tax Management Multistate Tax Portfolios 1610:02.B (1998). Washington imposes its tax on the "gross proceeds of sales," the "gross income" of the business, and the "value proceeding or accruing" depending on the type of activity producing the income. Wash. Rev. Code § 82.04.070, .080, .090. In order for taxpayer to be subject to Washington State's gross receipts tax, Washington State must establish that the taxpayer has "nexus" with the state. Wash. Rev. Code § 458.20.193(1)(d). Nexus is defined as "the activity carried on by the seller in Washington which is significantly associated with the seller's activity to establish or maintain a market for its products in Washington." Id. Although Washington's gross receipts tax is not classified as a "net income tax," taken together with the activities described at the time of the original protest, taxpayer has demonstrated that it meets the threshold activity level set out in 45 IAC 3.1-1-64 because Washington is a destination state which "has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." IC § 6-3-2-2(n).

FINDING

As to the fourteen specific state jurisdictions described herein, taxpayer's protest is sustained.

DK/DP/BK – January 9, 2007